



46 CFR Part 502

[Docket No. FMC-2023-0008]

RIN: 3072-AC95

Civil Penalty Amendments to Rules of Practice and Procedure

AGENCY: Federal Maritime Commission.

ACTION: Final rule.

SUMMARY: The Federal Maritime Commission (Commission) amends its Rules of Practice and Procedure governing the compromise, assessment, mitigation, settlement, and collection of civil penalties. These changes to the Commission regulations align with the statutory changes in the Ocean Shipping Reform Act of 2022 on penalties or refunds.

DATES: The effective date is [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION:

I. Background and Discussion

On June 16, 2022, the President signed the Ocean Shipping Reform Act of 2022 (“OSRA 2022”) into law,¹ which amended various provisions of the Shipping Act.² Section 8 of OSRA 2022 amended two Shipping Act provisions: 46 U.S.C. 41107 for monetary penalties or refunds; and 46 U.S.C. 41109 for assessment of penalties.

Before OSRA 2022, section 41107 stated that any person that violates the Shipping Act or a regulation or order of the Commission issued under the Shipping Act is liable for a civil penalty. OSRA 2022 changed the language in this section governing potential liability of a

¹ Pub. L. 117-146.

² 46 U.S.C. 40101-41310.

violator by adding the phrase “or, in addition to or in lieu of a civil penalty, is liable for the refund of a charge” immediately after the term civil penalty. Accordingly, the Commission may now order that a person is liable for “a civil penalty or, in addition to or in lieu of a civil penalty, is liable for the refund of a charge” for any violation of the Shipping Act, Commission regulations, or Commission order.

As a result, the term “refund” now appears in two key provisions of the Shipping Act. First, in addition to appearing in sections 41107 and 41109 (as amended by OSRA 2022), the term “refund” also appears in newly enacted section 41310, which explicitly addresses the issue of charge complaints. That provision specifies, among other things, that upon a finding by the Commission that a carrier’s charges do not comply with the Shipping Act, the Commission shall promptly order the refund of those charges paid. *See* 46 U.S.C. 41310(c). Second, the term “refund” appears in 46 U.S.C. 40503, which was not amended by OSRA 2022. This part of the Shipping Act addresses tariffs and service contracts. Under section 40503, the Commission may permit a common carrier or a conference to refund a portion of freight charges or to waive collection of a portion of such charges from shippers for certain errors in tariffs or tariff publications. The Commission’s regulation at 46 CFR 502.271 (Special docket application for permission to refund or waive freight charges) implements this tariff refund provision. This provision, however, only applies to a refund or waiver of freight charges by a common carrier’s own application to the Commission and does not include other types of charges. Further, the special docket application procedure does not provide for assessment of penalties. Therefore, when viewed against this backdrop, it is the Commission’s opinion that Congress amended section 41107, in part, to make it consistent with the Commission’s newly enacted authority to order a refund of charges paid under a charge complaint proceeding in section 10 of OSRA 2022, codified at 46 U.S.C. 41310.

OSRA 2022 also made identical changes to 46 U.S.C. 41109. Section 41109 provides how to assess civil penalties and how to determine their amounts. Section 41109 as amended by

OSRA 2022 states that the Commission may, after notice and opportunity for a hearing, “assess a civil penalty” or “in addition to, or in lieu of a civil penalty . . . order a refund of money.” 46 U.S.C. 41109(a)(1). OSRA 2022 also amended section 41109 by specifying the factors in determining “the amount of a civil penalty assessed or refund of money ordered.” 46 U.S.C. 41109(b)(1). While section 41109 now applies for assessment of penalties or refund, the Commission believes that section 41109’s revised factors are applicable only to assessment of penalties.

OSRA 2022 also provided that if the Commission orders a refund of money in addition to a civil penalty, the amount of civil penalty must be decreased by any additional amounts included in the refund of money in excess of the “actual injury” as defined in the Shipping Act at 46 U.S.C. 41305(a). *See* 46 U.S.C. 41109(b)(2)(A).

Therefore, the Commission makes conforming amendments to its regulations for civil penalties. The Commission is also making one technical change to update a term in 46 CFR 502.605(c).

II. Rulemaking Analyses

Administrative Procedure Act

The Administrative Procedure Act (APA) requires that “[g]eneral notice of proposed rulemaking shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law.” 5 U.S.C. 553(b). The notice of proposed rulemaking requirement, however, does not apply to “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.” 5 U.S.C. 553(b)(A). The notice requirement does not apply to this rule because it only amends the Commission’s rules of practice and procedure. Thus, the Commission issues this rule as a final rule.

Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601-612, provides that whenever an agency

publishes a notice of proposed rulemaking under the APA, 5 U.S.C. 553, the agency must prepare and make available for public comment a regulatory flexibility analysis (RFA) describing the impact of the rule on small entities, unless the head of the agency certifies that the rulemaking will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 603-605. As stated above, however, the APA notice requirement does not apply to this rulemaking for the Commission's practice and procedure. Therefore, the APA does not require the Commission to publish a notice of proposed rulemaking in this instance, and the Commission did not prepare an RFA.

National Environmental Policy Act

The Commission's regulations categorically exclude certain rulemakings from any requirement to prepare an environmental assessment or an environmental impact statement because they do not increase or decrease air, water or noise pollution or the use of fossil fuels, recyclables, or energy. 46 CFR 504.4. This rule amends the Commission's rules of practice and procedure at 46 CFR part 502. This rule thus falls within the categorical exclusion for matters related solely to "[p]romulgation of procedural rules pursuant to 46 CFR part 502." 46 CFR 504.4(a)(4). Therefore, no environmental assessment or environmental impact statement is required.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521) requires an agency to seek and receive approval from the Office of Management and Budget (OMB) before collecting information from the public. 44 U.S.C. 3507. The agency must submit collections of information in proposed rules to OMB in conjunction with the publication of the notice of proposed rulemaking. 5 CFR 1320.11. This rule does not contain any collections of information as defined by 44 U.S.C. 3502(3) and 5 CFR 1320.3(c).

Regulation Identifier Number

The Commission assigns a regulation identifier number (RIN) to each regulatory action listed in the Unified Agenda of Federal Regulatory and Deregulatory Actions (Unified Agenda). The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. You may use the RIN contained in the heading at the beginning of this document to find this action in the Unified Agenda, available at <https://www.reginfo.gov/public/do/eAgendaMain>.

List of Subjects in 46 CFR Part 502

Administrative practice and procedure, Claims, Equal access to justice, Investigations, Lawyers, Maritime carriers, Penalties, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Federal Maritime Commission amends 46 CFR part 502 as follows:

PART 502 – RULES OF PRACTICE AND PROCEDURE

1. The authority citation for part 502 is revised to read as follows:

AUTHORITY: 5 U.S.C. 504, 551, 552, 553, 556(c), 559, 561-569, 571-584; 591-596; 18 U.S.C. 207; 28 U.S.C. 2112(a); 31 U.S.C. 9701; 46 U.S.C. 305, 40103-40104, 40304, 40306, 40501-40503, 40701-40706, 41101-41109, 41301-41310, 44101-44106; 5 CFR part 2635.

2. Revise § 502.601 to read as follows:

§ 502.601 Purpose and scope.

The purpose of this subpart is to implement the statutory provisions of section 19 of the Merchant Marine Act, 1920 (46 U.S.C. 42101-42109), section 13 of the Shipping Act of 1984 as amended (46 U.S.C. 41107-41109), and sections 2(c) and 3(c) of Pub. L. 89-777 (46 U.S.C. 44104) by establishing rules and regulations governing the compromise, assessment, settlement and collection of civil penalties arising under certain designated provisions of the Merchant Marine Act, 1920, the Shipping Act of 1984, Public Law 89-777, and/or any order, rule, or regulation (except for procedural rules and regulations contained in this part) issued or made by the Commission in the exercise of its powers, duties and functions under those statutes.

3. In § 502.602, revise paragraph (h) to read as follows:

§ 502.602 Definitions.

* * * * *

(h) *Violation* includes any violation of sections 19(f)(4), 19(g)(4) and 19(k) of the Merchant Marine Act, 1920 (46 U.S.C. 42104(a), 42104(d), and 42108); any provision of the Shipping Act of 1984 as amended (46 U.S.C. 40101-41310); sections 2 and 3 of Pub. L. 89-777 (46 U.S.C. 44101-44106); and/or any order, rule or regulation (except for procedural rules and regulations contained in this part) issued or made by the Commission in the exercise of its powers, duties and functions under the Merchant Marine Act, 1920, the Shipping Act of 1984 as amended, or Pub. L. 89-777.

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4. In § 502.603, revise paragraphs (a) and (b) to read as follows:

§ 502.603 Assessment of civil penalties: Procedure; criteria for determining amount; limitations; relation to compromise.

(a) *Procedure for assessment of penalty.* The Commission may assess a civil penalty or, in addition to or in lieu of a civil penalty, a refund of a charge, only after notice and opportunity for hearing. Civil penalty assessment proceedings, including settlement negotiations, shall be governed by the Commission's Rules of Practice and Procedure in this part. All settlements must be approved by the Presiding Officer. The full text of any settlement must be included in the final order of the Commission.

(b) *Determination of amount--(1) Factors for consideration.* In determining the amount of a civil penalty assessed pursuant to paragraph (a) of this section, the Federal Maritime Commission shall take into consideration:

- (i) The nature, circumstances, extent, and gravity of the violation committed;
- (ii) With respect to the violator:
 - (A) The degree of culpability;

(B) Any history of prior offenses;

(C) The ability to pay; and

(D) Such other matters as justice may require; and

(iii) The amount of any refund of money ordered under 46 U.S.C. 41310.

(2) *Commensurate reduction in civil penalty*--(i) *In general.* In any case in which the Federal Maritime Commission orders a refund of money in addition to assessing a civil penalty, the amount of the civil penalty assessed shall be decreased by any additional amounts included in the refund of money in excess of the actual injury (as defined in 46 U.S.C. 41305(a)).

(ii) *Treatment of refunds.* A refund of money ordered shall be:

(A) Considered to be compensation paid to the applicable claimant; and

(B) Deducted from the total amount of damages awarded to that claimant in a civil action against the violator relating to the applicable violation.

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5. In § 502.605, revise paragraph (c) to read as follows:

§ 502.605 Payment of penalty: Method; default.

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(c) *Default in payment.* Where a respondent fails or refuses to pay a penalty properly assessed under § 502.603, or compromised and agreed to under § 502.604, appropriate collection efforts will be made by the Commission, including, but not limited to referral to the Department of Justice for collection. Where such defaulting respondent is a licensed ocean transportation intermediary, such default also may be grounds for revocation or suspension of the respondent's license, after notice and opportunity for hearing, unless such notice and hearing have been waived by the respondent in writing.

By the Commission.

William Cody

Secretary

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